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No. 84-125

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DANIEL RHOADES and MILTON BRATEN,
Petitioners,

—v.—

ACLI GOVERNMENT SECURITIES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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August 29, 1984

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York correctly hold that subject matter jurisdiction exists in this case pursuant to 28 U.S.C. § 1332 in view of the overwhelming evidence in the record that respondent is a Delaware corporation with its principal place of business in Chicago, Illinois and petitioners are both citizens of the State of New York.

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IN THE

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DANIEL RHOADES and MILTON BRATEN,

Petitioners,

—v.—

ACLI GOVERNMENT SECURITIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent ACLI Government Securities, Inc.[1] ("AGS") respectfully requests that this Court deny the petition for a writ of certiorari seeking to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 9, 1984.

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1 Pursuant to Rule 28.1 of this Court, ACLI Government Securities, Inc. states that it was formerly a wholly owned subsidiary of ACLI International, Inc., which presently is a wholly owned subsidiary of Donaldson, Lufkin & Jenrette, Inc. and is now called Donaldson, Lufkin & Jenrette Commodities, Inc. On April 2, 1984, ACLI Government Securities, Inc. was purchased by Kleinwort, Benson, Inc. and its name was thereafter changed to Kleinwort, Benson Government Securities, Inc.

STATEMENT OF THE CASE

After a four week trial, a jury of the Southern District of New York returned a verdict in favor of AGS. The jury found that petitioners Daniel Rhoades ("Rhoades"), an attorney practicing in New York State, and Milton Braten ("Braten"), a businessman, had breached their contracts with AGS in connection with the purchase and financing of United States government bonds. The Honorable Morris E. Lasker, United States District Judge, entered judgment against Rhoades in the sum of $1,285,598.28 and against Braten in the sum of $533,930.81, together with interest and costs (A 8-12).[2]

Rhoades moved after trial for dismissal based upon an alleged lack of diversity jurisdiction, claiming that AGS' principal place of business was not in Chicago, Illinois, as AGS claimed, but in New York. Rhoades' motion was denied by the district court (A 12-14). Rhoades appealed from this denial, and, in addition, Rhoades and Braten each moved *de novo* before the Court of Appeals for dismissal, arguing again that both they and AGS were citizens of New York at the time this action was commenced (SA 2, 4, 5)[3]. A panel of the Second Circuit Court of Appeals affirmed the district court and denied Rhoades' and Braten's motions (A 1-6). Rhoades' and Braten's subsequent applications for rehearing and rehearing in banc were denied (A 7).

Rhoades and Braten now assert before this Court (1) that AGS' complaint does not adequately allege petitioners' New York State citizenship, and (2) that the Court of Appeals erred in holding that AGS' principal place of business was in Chicago, not in New York, and that therefore AGS was a citizen of the State of Illinois. As demonstrated below, both claims are devoid of merit.

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2 References in the form "A__" are to pages of the Appendix annexed to the petition.

3 References in the form "SA__" are to respondent's annexed Supplemental Appendix.

REASONS FOR DENYING THE WRIT

DIVERSITY OF CITIZENSHIP BETWEEN PETITIONERS AND RESPONDENT IS ESTABLISHED IN THE RECORD

A. Petitioners are and were citizens of the State of New York

For the first time since the inception of this action, Rhoades and Braten claim that the complaint does not adequately allege their New York State citizenship. Although the pleadings in this action do not alone demonstrate petitioners' citizenship, the established fact is that Rhoades and Braten are, and were at the time this action was commenced, citizens of New York State. Failure to adequately allege diversity of citizenship does not defeat federal court jurisdiction where as a matter of fact, as in this case, diversity exists. *Sun Printing & Publishing Ass'n v. Edwards,* 194 U.S. 377 (1904); *Halstead v. Buster,* 119 U.S. 341 (1886); *Continental Life Ins. Co. v. Rhoads,* 119 U.S. 237 (1886).

In their answers to the complaint, Rhoades and Braten did not and indeed could not deny the allegation that they were residents of New York State at the time AGS commenced its action against them (A 14-17). As a result, both Rhoades and Braten have admitted this allegation. Fed. R. Civ. P. 8(d). Such proof of residency is *prima facie* evidence of citizenship, and shifts the burden of showing domicile in a non-diverse state to the party challenging jurisdiction. *See, e.g., Bradley Min. Co. v. Boice,* 194 F.2d 80, 84 (9th Cir. 1951); *Kellean v. Maryland Casualty Co. of Baltimore,* 112 F.2d 940, 943 (10th Cir. 1940), *rev'd on other grounds,* 312 U.S. 377 (1941). Significantly, not only have Rhoades and Braten failed to offer any proof that they were not citizens of the State of New York, they expressly represented to the Second Circuit that they were citizens of New York at the time this action was commenced. This representation was made *inter alia* in Rhoades' affidavit submitted

in support of petitioners' motions *de novo* before the Second Circuit to dismiss this action for lack of subject matter jurisdiction on the grounds that allegedly AGS' principal place of business was also in New York (SA 2, 4, 5).

Since the record establishes the diverse citizenship of the parties, any defect in the pleading of citizenship has been cured. In light of Rhoades' and Braten's admissions that they are citizens of New York, their claim that subject matter jurisdiction is somehow defeated by a "defect" in the complaint is meritless. *Sun Printing and Publishing Ass'n v. Edwards,* 194 U.S. at 382; *see also, Baer v. United Services Automobile Ass'n,* 503 F.2d 393, 397 (2d Cir. 1974).

B. Respondent AGS is and was a citizen of the State of Delaware and of the State of Illinois

With regard to AGS' citizenship, Rhoades and Braten allude to reliance by the Court of Appeals upon a pre-trial stipulation that AGS' principal office is in Illinois (Petition at 14-15), and to the Court of Appeals' supposed equation of "principal office" to "principal place of business" (Petition at i-ii, 3).

Nowhere in its opinion, however, did the Court of Appeals refer to the stipulation or equate "principal office" to "principal place of business." Rather, the Court of Appeals held that Rhoades' and Braten's attack upon subject matter jurisdiction is squarely defeated by the substantial evidence in the record introduced at the trial and appellate levels:

> [Rhoades' and Braten's] attack on the district court's determination that diversity jurisdiction exists turns on whether [AGS] is, as it has alleged, a corporation with its *principal place of business* in Illinois. . . . In this context, the district court's factual determination that [AGS] has its *principal place of business* in Illinois will be reversed only if clearly erroneous. *Village Fair Shopping Center Co. v. Sam Broadhead Trust,* 588 F.2d 431, 434 (5th Cir. 1979); *Riggs v. Island Creek Coal Co.,* 542 F.2d

> 339, 342 (6th Cir. 1979). We have reviewed the evidence submitted to the trial court and [Rhoades' and Braten's] facts submitted for the first time on this appeal. In view of the substantial evidence in the record reflecting [AGS'] contacts with the State of Illinois, we certainly cannot say the district court's conclusion was clearly erroneous. Thus, Rhoades' and Braten's motion to dismiss in this court is denied, and we find the district court properly denied Rhoades' similar motion in the court below.

(A 2-3, emphasis supplied.)

The conclusion of the district court referred to by the Court of Appeals was, more specifically, that the Chicago office of AGS, a corporation organized under the laws of Delaware,

> . . . is its "nerve center" and that Chicago is the place where [AGS] has "its most extensive contacts with, or greatest impact on, the general public." *R.G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2d Cir. 1979). Under the rulings of the Court of Appeals of this Circuit, these factors are the criteria for determining where a corporate party maintains its *principal place of business* and of what state it is a "citizen" within the meaning of Article III of the Constitution and of 28 U.S.C. § 1332. The fact that [AGS'] parent corporation is located in White Plains [N.Y.] and that two of [AGS'] traders and officers have at times operated from the parent office in White Plains, is insufficient either to confer New York citizenship upon [AGS] or deprive it of Illinois citizenship.

(A 13, emphasis supplied.)

Thus, the argument in the petition that the Court of Appeals and the district court confused "principal office" with "principal place of business," or relied upon the pre-trial stipulation as to AGS' principal office, is totally unfounded.

Petitioners' further claim that "[t]here have been no findings of fact herein as to respondent's activities" (Petition at 15)

ignores the district court's specific findings that AGS' "nerve center" and its public contacts and impact were in Chicago, Illinois. In addition, the Court of Appeals itself reviewed the factual record before the district court, as well as additional facts submitted by petitioners on appeal, and independently concluded that AGS' principal place of business was in Chicago. Thus, petitioners' assertion that the Court of Appeals should have remanded the case for findings of fact is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied. Additionally, because the questions presented by petitioners are spurious and because the petition is frivolous, AGS requests that it be awarded double its costs and reasonable attorneys' fees incurred in opposing the petition. Supreme Court Rule 57.7; *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766 (1980).

Respectfully submitted,

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CURTIS, MALLET-PREVOST,
COLT & MOSLE

SCOTT J. MCKAY WOLAS
DANIEL R. LENIHAN
Of Counsel

Dated: August 29, 1984

SUPPLEMENTAL APPENDIX

Excerpted Pertinent Portion of Braten's Notice of Motion to Dismiss Under Fed. R. Civ. P. 12(h)(3)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ACLI GOVERNMENT SECURITIES, INC.,

Plaintiff-Appellee,

—against—

DANIEL RHOADES and MILTON BRATEN,

Defendants-Appellants.

NOTICE OF MOTION TO DISMISS
UNDER F.R.C.P. 12(h)(3)

MOTION BY: Archibald A. Patterson

APPEARING FOR: Milton Braten

. . .

Brief statement of the relief requested:

Motion to dismiss pursuant to F.R.C.P. 12(h)(3) for lack of subject matter jurisdiction.

. . .

Previous requests for similar relief and disposition:

None.

Statement of issue(s) presented by this motion:

Is there subject matter jurisdiction of [sic] this action against us by reason of diversity of citizenship.

Brief statement of the facts (with page references to the moving papers):

Defendants are citizens of New York.

Plaintiff corporation asserted Illinois citizenship.

Numerous facts show plaintiff's principal place of business is New York.

Summary of the argument (with page references to the moving papers):

Plaintiff has an office in New York;

Plaintiff is controlled from New York;

Banks in New York;

Plaintiff conducts business substantially as controlled division of New York parent corporation;

See Rhoades' Affidavit, *passim.*

Excerpted Pertinent Portion of Rhoades' Notice of Motion to Dismiss Under Fed. R. Civ. P. 12(h)(3)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ACLI GOVERNMENT SECURITIES, INC.,

Plaintiff-Appellee,

—against—

DANIEL RHOADES and MILTON BRATEN,

Defendants-Appellants.

NOTICE OF MOTION TO DISMISS
UNDER F.R.C.P. 12(h)(3)

MOTION BY: Daniel Rhoades

APPEARING FOR: Pro Se

. . .

Brief statement of the relief requested:

Motion to dismiss pursuant to F.R.C.P. 12(h)(3) for lack of subject matter jurisdiction.

. . .

Previous requests for similar relief and disposition:

Motion in the District Court.

Statement of the issue(s) presented by this motion:

Is there subject matter jurisdiction of [sic] this action against us by reason of diversity of citizenship.

Brief statement of the facts (with page references to the moving papers):

Defendants are citizens of New York.

Plaintiff corporation asserted Illinois citizenship.

Numerous facts show plaintiff's principal place of business is New York.

Summary of the argument (with page references to the moving papers):

Plaintiff has an office in New York;

Plaintiff is controlled from New York;

Banks in New York;

Plaintiff conducts business substantially as controlled division of New York parent corporation.

See Rhoades' Affidavit, *passim*.

Excerpted Pertinent Portion of Rhoades' Affidavit in Support of Motions to Dismiss Under Fed. R. Civ. P. 12(h)(3)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ACLI GOVERNMENT SECURITIES, INC.,

Plaintiff-Appellee,

—against—

DANIEL RHOADES and MILTON BRATEN,

Defendants-Appellants.

AFFIDAVIT IN SUPPORT OF MOTIONS TO DISMISS
UNDER F.R.C.P. 12(h)(3)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DANIEL RHOADES, being duly sworn, deposes and says:

1. I am one of two New York citizens sued herein in 1981 for breach of contract. Our answers denied plaintiff's allegation that it was a Delaware corporation with its principal place of business in Illinois. There was an issue whether the United States District Court for the Southern District of New York had subject matter jurisdiction of this action against us by reason of diversity of citizenship of plaintiff and defendants.

. . .

/s/
DANIEL RHOADES

Sworn to before me this
25th day of November, 1983

/s/

Thomas Lagrotta
Notary Public . . .